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FILED
APR 18 1994
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No. 93-1272

In the Supreme Court of the United States

OCTOBER TERM, 1993

RONALD M. ANDERSEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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18 pp

QUESTION PRESENTED

Whether the Civil Service Reform Act precludes judicial review of a federal employee's claim that he was constructively discharged from employment in violation of his constitutional rights.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is unpublished, but the decision is noted at 8 F.3d 25 (Table). The opinion of the district court (Pet. App. 30a-68a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 5, 1993. The petition for writ of certiorari was filed on January 3, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111 (codified, as amended, in various sections of 5 U.S.C.), provides a comprehensive scheme of protections and remedies for federal employees adversely affected by personnel actions. See *United States* v. *Fausto*, 484 U.S. 439, 445-446 (1988). The extent of an employee's protections and remedies under the CSRA, however, depends upon the kind of position he or she holds within the civil service. In this regard, the CSRA divides federal employees into three categories: the Senior Executive Service, the competitive service, and the excepted service.[1] Petitioner, a "Schedule A" employee, was a member of the excepted service. Pet. App. 4a, 12a n.8; see 5 C.F.R. 213.3102(d).

Chapter 23 of the CSRA forbids an agency to engage in certain "prohibited personnel practices." See 5 U.S.C. 2302.[2] An employee may file an

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[1] Senior Executive Service employees are those who occupy high-level positions but need not be nominated by the President or confirmed by the Senate. 5 U.S.C. 2101a, 3132(a)(2). Competitive service employees are all other employees who need not be so nominated or confirmed, and who are not specifically exempted from the competitive service by statute or regulation. 5 U.S.C. 2102. The excepted service consists of all civil service personnel who are in neither the Senior Executive Service nor the competitive service. 5 U.S.C. 2103. See *Fausto*, 484 U.S. at 441 n.1.

[2] The CSRA lists a number of such proscribed practices, including any personnel action that would violate the "merit system principles" enumerated in the Act. 5 U.S.C. 2302(b)(11). The CSRA in turn identifies merit system principles to include *inter alia* the maintenance of "high standards of integrity, conduct, and concern for the public interest,"

allegation of such a prohibited practice with the Office of Special Counsel (OSC), "whose responsibility it is to investigate the charges and, where appropriate, to seek remedial action from the agency and the [Merit Systems Protection Board (MSPB)]." *Fausto*, 484 U.S. at 446 (citing 5 U.S.C. 1206). The OSC's power to request that the MSPB take corrective action, however, is discretionary and the CSRA does not provide for judicial review of an OSC decision not to make such a request.

Chapter 75 of the CSRA allows employees to contest certain "adverse actions"—principally removal or suspension from employment—by petitioning the MSPB for relief. 5 U.S.C. 7501-7504, 7511-7514. If necessary, an employee may then seek judicial review of the MSPB's decision. 5 U.S.C. 7703.

The CSRA also gives employees—including excepted service personnel—the option to pursue grievance procedures under a collective bargaining agreement. See 5 U.S.C. 7103(a)(9)(A). Such grievances may go to arbitration, and exceptions to the arbitration decision may be filed with the Federal Labor Relations Authority. See 5 U.S.C. 7121, 7122.

In 1988—the time of the events relevant to this case—most excepted service employees were entitled to the protections of Chapter 23, but not Chapter 75. Chapter 23 applied to all excepted service employees except those in positions of a confidential or policy-making nature. 5 U.S.C. 2302(a)(2)(B); see *Fausto*,

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5 U.S.C. 2301(b)(4), and protection "against reprisal for the lawful disclosure of information which the employees reasonably believe evidences * * * a violation of any law, rule, or regulation." 5 U.S.C. 2301(b)(9)(A).

484 U.S. at 446. Chapter 75, however, applied only to those excepted service employees who were considered "preference eligible," 5 U.S.C. 7511(a)(1)(B)—*i.e.*, veterans of military service and their close relatives. 5 U.S.C. 2108; see *Fausto*, 484 U.S. at 441 n.1.

b. Subsequent to the personnel action at issue in this case, Congress twice amended the CSRA. In 1989, Congress passed the Whistleblower Protection Act, Pub. L. No. 101-12, 103 Stat. 16. This Act allows employees who qualify as "whistleblowers" to obtain MSPB review of the OSC's decision not to take action and judicial review of the MSPB's decision. See 5 U.S.C. 1214(a)(3) (Supp. IV 1992), 1221(a) and (h) (Supp. IV 1992).

In 1990, Congress amended the CSRA to provide that excepted service employees who are reduced in grade or removed for unacceptable performance are entitled to appeal the action to the MSPB. Civil Service Due Process Amendments, Pub. L. No. 101-376, § 2(b), 104 Stat. 462; see 5 U.S.C. 4303(e)(3) (Supp. IV 1992). In those same amendments, Congress extended the protections of Chapter 75 to excepted service employees with two years of continuous service. 5 U.S.C. 7511(a)(1)(C)(ii) (Supp. IV 1992). Because these amendments do not apply to personnel actions taking effect before August 17, 1990, see Pub. L. No. 101-376, § 2(c), 4, 104 Stat. 462, 463, they do not apply in this case.

2. Until February, 1988, petitioner was employed as a trial attorney in the District Office of the Equal Employment Opportunity Commission (EEOC) in Phoenix, Arizona. Pet. App. 4a, 31a. From late 1987 to early 1988, petitioner was assigned as lead counsel

in a sexual harassment case in New Mexico. *Id.* at 4a. During trial preparation, petitioner learned that one of the charging parties had allegedly offered $2,000 to a witness in exchange for false testimony and that another witness had offered to sell his testimony to all three charging parties for $10,000. *Id.* at 32a-33a.

Petitioner expressed his concern about these revelations to his supervisors. Pet. App. 33a-34a. Ultimately, however, petitioner and his superiors disagreed as to the appropriate response to the situation. *Id.* at 4a. Petitioner came to believe that it was his ethical obligation to withdraw from the case and inform the court of what he had learned. *Id.* at 5a. His supervisors expressly forbade him from doing so, and told him that any such action would be considered insubordinate. *Ibid.*

On February 9, 1988, petitioner resigned. Pet. App. 36a-39a. The next day, petitioner traveled to New Mexico and disclosed his knowledge to the court, which vacated the trial date. *Id.* at 39a-40a. The case was subsequently settled.[3] Upon his return to Phoenix, petitioner completed the formal employment termination process—characterizing his resignation as a "constructive discharge." *Id.* at 6a.

Shortly thereafter, petitioner sought reinstatement through a number of channels, none of which proved successful. Pet. App. 6a-7a, 40a. Petitioner

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[3] Petitioner reported the suspected perjury and bribery to the U.S. Attorney's Office, which referred the matter to the FBI. The FBI, after investigation, declined to file charges. Petitioner also filed professional responsibility grievances against his supervisors with the Arizona and Wisconsin Bars, alleging violations of the Code of Professional Responsibility. Both Bars dismissed the complaints.

asked his union to file a grievance on his behalf, but the union declined after determining that petitioner's resignation had been voluntary. *Id.* at 40a-41a. Petitioner also filed a complaint with the Office of Special Counsel, alleging that he had been constructively discharged for whistleblowing. *Id.* at 6a-7a. After conducting an investigation, the OSC found insufficient evidence of any prohibited personnel practice and declined to pursue the matter further. *Id.* at 7a.

3. In February, 1989, petitioner filed the instant action in federal district court alleging that he had been constructively discharged in violation of the Constitution. Pet. App. 8a, 41a-42a.[4] The district court dismissed the action on the ground that the Civil Service Reform Act precluded judicial review of petitioner's claims. *Id.* at 30a-68a.

4. The court of appeals affirmed in an unpublished memorandum opinion. Pet. App. 1a-29a. The court held that the CSRA provides the exclusive remedy for petitioner to pursue his claims. The court rejected petitioner's argument that Congress contemplated an exception to the exclusivity of the CSRA for matters relating to the ethical obligations of government attorneys. *Id.* at 14a-16a. The court also rejected

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[4] Petitioner alleged that he had a property right in his continued employment, as well as a liberty interest arising from his status as an officer of the court, and that the EEOC violated his right to due process by not giving him a hearing on his constructive discharge claim. Pet. App. 8a. Petitioner also asserted a violation of his First Amendment rights, a denial of due process under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, and a pendent state claim for wrongful termination. *Ibid.*

petitioner's contention that relief is available under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, notwithstanding the comprehensive remedial scheme embodied in the CSRA. *Id.* at 24a-28a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Moreover, the continuing significance of the matter is minor in light of recent amendments to the CSRA. Further review is therefore unwarranted.

1. Petitioner seeks to maintain this action in the face of overwhelming authority from this Court and the federal appellate courts that the CSRA provides the sole and exclusive method for adjudicating personnel matters involving federal employees that are cognizable under the CSRA. As these courts recognize, the comprehensive nature of the CSRA thus forecloses federal employees from challenging adverse personnel actions through the judicial review provisions of more general statutes. See *Fausto*, 484 U.S. at 445; *Karahalios* v. *National Fed'n of Fed. Employees*, 489 U.S. 527, 536 (1989); *Stephens* v. *HHS*, 901 F.2d 1571, 1575-1576 (11th Cir.), cert. denied, 498 U.S. 998 (1990); *Mullenberg* v. *United States*, 857 F.2d 770 (Fed. Cir. 1988); *Towers* v. *Horner*, 791 F.2d 1244, 1247 (5th Cir. 1986); *Weatherford* v. *Dole*, 763 F.2d 392, 393-394 (10th Cir. 1985); *Pinar* v. *Dole*, 747 F.2d 899, 912-913 (4th Cir. 1984), cert. denied, 471 U.S. 1016 (1985); *Carducci* v. *Regan*, 714 F.2d 171, 173-175 (D.C. Cir. 1983); *Braun* v. *United States*, 707 F.2d 922, 926-927 (6th Cir. 1983).

In *Fausto*, this Court held that a "nonpreference" member of the excepted service could not sue an agency under the Back Pay Act, 5 U.S.C. 5596, to challenge his dismissal. Noting that the CSRA provides "an integrated scheme of administrative and judicial review [that is] designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration," 484 U.S. at 445, the Court held that Congress had intended to preclude review under more general statutes such as the Back Pay Act. The Court concluded that Congress's failure to provide for administrative and judicial review with respect to certain personnel actions manifested "a considered congressional judgment" that those actions should not be judicially reviewable. *Id.* at 448-449.

The CSRA remains the sole and exclusive remedy for all claims arising from federal employment, including constitutional claims. As this Court explained in *Schweiker* v. *Chilicky*, 487 U.S. 412, 423 (1988), it is inappropriate for the judiciary to fashion additional remedies for alleged constitutional violations "[w]hen the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration."

The CSRA's detailed remedial scheme expressly provides for review of constitutional allegations. The CSRA defines "prohibited personnel practices" to include actions that violate "any law, rule or regulation * * * directly concerning[] the merit system principles." 5 U.S.C. 2302(b)(11). The CSRA's legislative history makes clear that any action in

violation of an employee's constitutional rights violates these merit system principles and therefore constitutes a prohibited personnel practice. H.R. Conf. Rep. No. 1717, 95th Cong., 2d Sess. 131 (1978). As this Court has recognized, "[c]onstitutional challenges to agency action, such as the First Amendment claims raised by petitioner, are fully cognizable within this [CSRA] system." *Bush* v. *Lucas*, 462 U.S. 367, 386 (1983).

Accordingly, the CSRA is petitioner's sole vehicle for review of his constructive discharge claim. Prior to the 1989 and 1990 amendments, petitioner had two avenues of relief: a charge of a "prohibited personnel practice" with the OSC or a grievance. Neither petitioner nor his union filed a timely grievance, and the OSC concluded that petitioner's resignation had been voluntary and that no prohibited personnel practice occurred.

2. Recognizing that the CSRA provides an exclusive remedy for federal personnel actions, petitioner asks this Court to carve out an exception for matters involving professional ethics. He argues (Pet. 10-24) that Congress intended that the CSRA not apply to employment disputes involving compliance with ethical obligations.

Petitioner's contention finds no support in the language of the statute, which covers a broad range of personnel actions and also covers substantial classes of employees bound by professional ethical standards. The CSRA's injunction against prohibited personnel practices encompasses retaliation for "whistleblowing" as well as any other action that violates "merit system principles." 5 U.S.C. 2302(b)(8) and (b)(11). Those principles include the maintenance of

"high standards of integrity, conduct, and concern for the public interest," 5 U.S.C. 2301(b)(4), and protection from reprisal "for the lawful disclosure of information which the employees reasonably believe evidences * * * a violation of any law, rule, or regulation." 5 U.S.C. 2301(b)(9)(A). Petitioner's claim—that he was constructively discharged as a result of his desire to report suspected perjury and bribery—falls squarely within these provisions.

Petitioner's contention is further rebutted by the recent amendments to the CSRA. The 1989 amendments made judicial review available to all whistleblowers for claims such as the one involved here. See 5 U.S.C. 1221 (Supp. IV 1992), 2302(b)(8) (Supp. IV 1992). Moreover, the 1990 amendments expanded the remedies available to excepted service employees—including attorneys subject to professional ethical standards. See 5 U.S.C. 4303(e)(3) (Supp. IV 1992); 5 C.F.R. 213.3102. As the court of appeals noted, "[i]nstead of exempting such employees and such grievances from the CSRA regime, Congress has progressively expanded the remedies available for whistleblowers and those whose jobs are jeopardized by maintaining 'high standards of integrity, conduct, and concern for the public interest.' 5 U.S.C. § 2301(b)(4)." Pet. App. 16a.

Moreover, Congress expressly provided that these amendments do not apply retroactively to cases such as this one. See Whistleblower Protection Act, Pub. L. No. 101-12, § 7(b), 103 Stat. 34. As in *Fausto*, the decision not to provide for administrative and judicial review with respect to petitioner's claim manifests "a considered congressional judgment" that may not be ignored by the judiciary. 484 U.S. at 448-449.

3. Petitioner next argues (Pet. 25-28) that the court of appeals' decision here is inconsistent with the D.C. Circuit's decision in *Spagnola* v. *Mathis*, 859 F.2d 223 (1988) (en banc). This contention is without merit.

In *Spagnola*, the D.C. Circuit held that the CSRA's comprehensive remedial scheme *precludes* judicial review of constitutional claims—even if the CSRA provides no judicial review at all. See 859 F.2d at 226-229. In the course of arriving at this decision, the *Spagnola* court confirmed that Congress intended to include constitutional violations within the CSRA's comprehensive remedial scheme, and that Congress's failure to provide remedies for some adverse actions was not inadvertent. *Id.* at 229 & n.12.

Petitioner relies not upon the holding or the result in *Spagnola*, but upon the following *dictum* at the end of the opinion: "While we decline to extend *Bivens* remedies to Hubbard and Spagnola, we do not suggest that the CSRA precludes the exercise of federal jurisdiction over the constitutional claims of federal employees and job applicants altogether." 859 F.2d at 229. This unfocused *dictum* does not create a circuit conflict that warrants review by this Court. Moreover, even if one viewed *Spagnola* as creating a circuit conflict, review would be inappropriate here. To begin with, this Court's precedents clearly dispose of petitioner's claim. See *Fausto*, *supra*; *Chilicky*, *supra*; *Bush* v. *Lucas*, *supra*. Furthermore, the issue presented here is of minimal continuing significance. Under the 1989 and 1990 amendments to the CSRA, federal employees like petitioner may obtain judicial review of major personnel actions as well as complaints of retaliation for whistleblowing. See 5 U.S.C.

1221 (Supp. IV 1992), 4303(e)(3) (Supp. IV 1992), 7703. Any federal employee alleging that he or she was discharged for complying with professional ethical obligations currently can seek full redress in the courts.

4. Finally, petitioner argues (Pet. 28-29) that the Administrative Procedure Act allows judicial review of his constructive discharge claim. The APA, however, expressly states that its judicial review provisions do not apply where the relevant statute "preclude[s] judicial review," 5 U.S.C. 701(a)(1), or where the "agency action is committed to agency discretion by law." 5 U.S.C. 701(a)(2). This Court has held that the comprehensive nature of the CSRA indicates a clear congressional intent to preclude judicial review where such review is not provided for in the CSRA. *Fausto*, *supra*.[5] The APA therefore does not provide a basis for judicial review in cases such as this one.

Petitioner's reliance (Pet. 29) on *Bowen* v. *Massachusetts*, 487 U.S. 879 (1988), for the proposition that the CSRA does not preclude an APA remedy, is misplaced. *Bowen* involved neither the CSRA nor the federal civil service. Rather, at issue in *Bowen* was whether a federal district court, or the Claims Court, had jurisdiction to review a final order of the Secretary of Health and Human Services reimbursing a State for a category of expenditures under its Medicaid program. See *id.* at 882. The Court held

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[5] See also *Saul* v. *United States*, 928 F.2d 829 (9th Cir. 1991); *Veit* v. *Heckler*, 746 F.2d 508 (9th Cir. 1984); *Stephens* v. *HHS*, *supra*; *Towers* v. *Horner*, *supra*; *Weatherford* v. *Dole*, *supra*; *Pinar* v. *Dole*, *supra*; *Carducci* v. *Regan*, *supra*; *Broadway* v. *Block*, 694 F.2d 979, 986 (5th Cir. 1982).

that the APA applied to the Secretary's decision and therefore that the district court properly exercised jurisdiction. *Id.* at 892-911.

Prior to the passage of the CSRA, the APA may have been available to challenge certain employment decisions. See H.R. Rep. No. 1656, 94th Cong., 2d Sess. 8 (1976). However, the CSRA replaced the "outdated patchwork of statutes and rules built up over almost a century." S. Rep. No. 969, 95th Cong., 2d. Sess. 3, 53 (1978). As this Court made clear in *Fausto*, the CSRA is now the exclusive avenue of relief available to employees seeking review of, and redress for, the kind of prohibited personnel practice alleged in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1994